

GRASSROOTS LEADERSHIP,

Plaintiff,

v.

UNITED STATES CITIZENSHIP AND
IMMIGRATION SERVICES,

Defendant.

1. This action is brought under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, to compel United States Citizenship and Immigration Services (USCIS), a component of the Department of Homeland Security (DHS), to produce records responsive to a FOIA request regarding the fee waiver policies applicable to the USCIS Humanitarian program.

2. This Court has jurisdiction under 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B). Venue is proper under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

3. Plaintiff Grassroots Leadership is a nationally recognized civil and human rights organization based in Austin, Texas, fighting to end prison profiteering and reduce reliance on criminalization and detention through direct action, organizing, research, and public education.

5. Defendant has possession of and control over the records that Plaintiff seeks.

STATEMENT OF FACTS

USCIS Fee Waiver Requests

6. Congress expressly requires that USCIS permit fee waiver applications made by self-petitioners under the Violence Against Women Act, Pub. L. No. 103-322, 108 Stat. 1796, 1902–55 (1994) (VAWA), victims of certain enumerated crimes (U-visa applicants), and victims of human trafficking (T-visa applicants), who are statutorily entitled to immigration relief but often do not have sufficient funds to file the necessary documents without a fee waiver. *See* 8 U.S.C. § 1255(l)(7) (requiring the Secretary to permit fee waiver applications from such individuals); *see also* 8 C.F.R. § 103.7(c) (stating that eligibility for fee waivers is based on inability to pay).

7. USCIS released a new form in 2010, Form I-912, with accompanying instructions, to facilitate the fee waiver process by providing a standard means for submitting fee waiver requests. U.S. Citizenship & Imm. Servs., “Form I-912, Request for Fee Waiver,” OMB No. 1615-0116, *available at* <https://www.uscis.gov/i-912>. On March 13, 2011, USCIS issued a policy memorandum providing binding guidance on processing fee waiver requests filed pursuant to 8 C.F.R. § 103.7(c). U.S. Citizenship & Imm. Servs., *Fee Waiver Guidelines as Established by the Final Rule of the USCIS Fee Schedule; Revisions to Adjudicator’s Field Manual (AFM) Chapter 10.9, AFM Update AD11-26, PM-602-0011.1* (Mar. 13, 2011) (hereinafter 2011 Policy Memo). The 2011 Policy Memo states, *inter alia*, that requests may be submitted using Form I-912 or by way of a written statement from the applicant, and that applicants may submit additional documentation to provide proof of inability to pay. *Id.* at 2, 4. The 2011 Policy Memo details USCIS’s consideration of fee waiver requests based on whether the applicant is receiving a means-tested benefit, whether the applicant’s household income level renders him or her unable to pay, or whether recent financial hardship otherwise renders him or

her unable to pay. *Id.* at 5–8. Further, the 2011 Policy Memo provides examples of supporting documentation and indicates that requests may be approved in the absence of additional documentation provided that the applicant’s request is sufficiently detailed to substantiate his or her inability to pay the fee. *Id.* at 4–8.

8. Since the issuance of the 2011 Policy Memo, VAWA, U, and T applicants have routinely submitted fee waiver requests, which were, until recently, regularly granted even with limited supporting documentation. Because abusers, traffickers, and other perpetrators often prevent VAWA, U, and T applicants from accessing documentation which would show their inability to pay, such applicants face significant barriers in demonstrating their inability to pay. In recognition of the difficulties that VAWA, U, and T applicants face in obtaining supporting evidence, Congress created the special “any credible evidence” standard, 146 Cong. Rec. S.10,188, S10,195 (Oct. 11, 2000), which directs USCIS to consider “any credible evidence relevant to” VAWA, U, and T applications. INA §§ 204(a)(1)(J), 214(p)(4), 216(c)(4); *see also* 8 C.F.R. §§ 103.2(b)(2)(iii), 204.1(f)(1), 204.2(c)(2)(i), 214.11(d)(2)(ii), 214.11(d)(5), 214.14(c)(4), 214.14(f)(5). Under this lenient standard, VAWA, U, and T applicants are not required to demonstrate that preferred primary or secondary evidence is unavailable. *E.g.*, 8 C.F.R. §§ 103.2(b)(2)(iii). Agency directors have repeatedly advised that VAWA, U, and T applications may not be denied for failure to submit a particular type of document as evidence. Memorandum from T. Alexander Aleinikoff, Exec. Assoc. Comm’r, Imm. & Naturalization Serv. (Apr. 16, 1996); Memorandum from Paul W. Virtue, Office of Gen. Counsel, Imm. & Naturalization Serv. to Terrence M. O’Reilley, Director, Admin. Appeals Office, 2001 WL 1047693 (Oct 16, 1998). The USCIS Adjudicator’s Field Manual incorporates the “any credible

evidence” standard as codified for VAWA, U, and T applicants. U.S. Citizenship & Imm. Servs., Adjudicator’s Field Manual, ch. 21.14, 21.15, 39.1, 39.2.

9. To date, USCIS has not publicly issued any policy statements, interpretations, or other guidance purporting to modify, rescind, or replace the 2011 policy memorandum.¹ It has come to Plaintiff’s attention, however, that USCIS may have recently changed its policy for receiving and adjudicating fee waiver requests from VAWA, U, and T applicants, without announcing such changes publicly.

10. Substantial public attention has been devoted to the apparent change in USCIS’s fee waiver policies. Immigration attorneys have noted inconsistent adjudications of fee waiver requests and an increase in fee waiver denials since at least early 2018, often with little to no explanation of the basis for such denials. In September 2018, more than 200 organizations wrote a letter expressing concern about the matter to USCIS Director L. Francis Cissna. Letter to Mr. L. Francis Cissna, Director, U.S. Citizenship & Imm. Servs. (Sept. 4, 2018), *available at* <https://perma.cc/U74A-UQDP>. The organizations observed that the apparently unannounced changes have resulted in a significant increase in fee waiver denials, compelling practitioners to spend critical and limited resources and, in numerous cases, causing applicants to miss critical deadlines. The spike in fee waiver denials, particularly when combined with the expiration of critical deadlines, can result in applicants not seeking or receiving the humanitarian relief for which they are eligible, which heightens their risk of potential detention and even removal.

¹ USCIS recently published notices regarding proposed changes to Form I-912. 83 Fed. Reg. 49120 (Sept. 28, 2018); 84 Fed. Reg. 13687 (Apr. 5, 2019). However, no changes have taken effect as of the present date, nor has the 2011 Policy Memo been rescinded or replaced. Accordingly, the 2011 Policy Memo remains as controlling guidance for fee waiver review and adjudication by USCIS.

11. USCIS stated informally in mid-2018 to a network of legal services providers and advocates that the VAWA, T, and U Humanitarian program has “implemented the USCIS-wide policy regarding fee waivers,” but has not otherwise publicly clarified any policy changes applicable to such fee waiver adjudications. ASISTA, “USCIS Response to ASISTA Fee Waivers,” *available at* <https://perma.cc/4U9L-H5A9>.

Plaintiff’s FOIA Request

12. On January 30, 2019, Plaintiff submitted a FOIA request to USCIS, seeking records regarding the fee waiver policies applicable to the USCIS VAWA, T, and U Humanitarian program.

13. Specifically, Plaintiff requested:

1. “[T]he USCIS-wide policy regarding fee waivers,” that is referenced in a July 2018 email from the Vermont Service Center Humanitarian Division to ASISTA. The relevant portion of the email is available at: <https://perma.cc/4U9L-H5A9>.
2. Any policies, rules, interpretations, instructions, procedures, guidance documents, communications, or other records that were created, received, or modified between January 20, 2017 and the date of processing of this request, that are applicable to the USCIS VAWA, T, and U Humanitarian program, and that discuss, describe, reference, or otherwise refer or apply to:
 - a. The implementation by the USCIS VAWA, T, and U Humanitarian program of “the USCIS-wide policy regarding fee waivers,” as described in the July 2018 statement by USCIS *available at* <https://perma.cc/4U9L-H5A9>.
 - b. Any consideration of amending, revising, repealing, or replacing any policy regarding fee waiver requests.

- c. The September 4, 2018 letter to Director L. Francis Cissna from 232 concerned organizations regarding the USCIS VAWA, T, and U Humanitarian program's fee waiver policy, *available at* <https://perma.cc/U74A-UQDP>.
 - d. The evaluation, adjudication, and/or decision-making criteria for fee waiver requests.
 - e. The types of evidence to accept and/or require in support of fee waiver requests.
 - f. The specific forms of written fee waiver requests to accept and/or require, including but not limited to the use of Form I-912.
 - g. The evidentiary standard for fee waiver requests, including but not limited to any policy relating to the "any credible evidence" standard. *E.g.*, INA § 204(a)(1)(J).
 - h. The effect, if any, of a prior fee waiver on the adjudication of a subsequent fee waiver request.
 - i. The explanation to be provided to the requestor regarding the basis for denial of a fee waiver request.
 - j. The adjudication of fee waiver requests upon resubmission of such requests.
3. Any policies, rules, interpretations, instructions, procedures, or guidance documents that were applicable to the USCIS VAWA, T, and U Humanitarian program as of January 1, 2017, and that discuss, describe, reference, or otherwise refer or apply to the subject areas listed in category 2 above.

14. Additionally, pursuant to 5 U.S.C. § 552(a)(1), Plaintiff requested that USCIS publish in the Federal Register any of the records described above that, under that provision, constitute

descriptions of the methods whereby the public may obtain information, make submittals or requests to the agency, or obtain decisions; statements of the general course and methods by which the agency's functions are channeled and determined; rules of procedure, descriptions of forms available or the places at which forms may be obtained, or instructions as to the scope and content of papers, reports, or examinations; substantive rules of general applicability, or statements of general policy or interpretations of general applicability formulated and adopted by the agency; amendments, revisions, or repeals of the foregoing; and/or any other type of document covered by section 552(a)(1).

15. Further, pursuant to 5 U.S.C. § 552(a)(2), Plaintiff requested that USCIS disclose to the public on its website any of the records described above that, under that provision, constitute statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; administrative staff manuals and instructions to staff that affect a member of the public; and/or any other type of document covered by section 552(a)(2).

16. Plaintiff included a request for a public interest fee waiver of all fees in connection with its FOIA request, pursuant to 5 U.S.C. § 552(a)(4)(A)(iii).

17. By letter dated February 8, 2019, USCIS confirmed receipt of the FOIA request, and assigned it case number COW2019000126. USCIS stated that it was granting Plaintiff's request for a fee waiver. USCIS notified Plaintiff that due to "unusual circumstances," it was invoking a ten-day extension to respond to the request, pursuant to 5 U.S.C. § 552(a)(6)(B).

**CAUSE OF ACTION
(FOIA – Failure to Disclose Responsive Records)**

18. Plaintiff incorporates by reference all allegations contained in Paragraphs 1–17 above (and all subparts thereto) as if set forth fully herein.

19. Plaintiff has a statutory right under FOIA, 5 U.S.C. § 552(a)(3)(A), to declaratory and injunctive relief compelling the release and disclosure of the requested agency records. USCIS has no legal basis for failing to disclose them.

20. Under 5 U.S.C. § 522(a)(6)(A)(i), Defendant was required to make a determination and notify Plaintiff of its right to appeal any adverse determination within 20 working days. Even assuming unusual circumstances applied under 5 U.S.C. § 552(a)(6)(B), Defendant was entitled at most to a ten-day extension. More than 30 working days have passed since Defendant received Plaintiff's FOIA request, and Defendant has neither made a final determination nor produced any records in response to Plaintiff's request.

21. Under 5 U.S.C. § 552(a)(6)(C)(i), Plaintiff has exhausted its administrative remedies with respect to its January 30, 2019, FOIA request.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests that this Court:

(1) Declare that USCIS's failure to provide the requested records in response to Plaintiff's FOIA request within the required time limits is unlawful;

(2) Order USCIS to make the requested records available to Plaintiff at no charge within 14 days of the Court's order;

(3) Award Plaintiff its costs and reasonable attorneys' fees pursuant to 5 U.S.C. § 552(a)(4)(E); and

(4) Grant such other relief as this Court may deem just and proper.

Dated: May 16, 2019

Respectfully submitted,

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Admission Application Pending

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